IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

POTTERS CLAY REALTY, L.L.C., AN ARIZONA LIMITED LIABILITY COMPANY; AND ELDERCARE FOR LIFE, INC., AN ARIZONA NON-PROFIT CORPORATION,
Plaintiffs/Appellees/Cross-Appellants,

v.

GERALD A. KUMMER AND KUNIE M. KUMMER, CO-TRUSTEES OF THE GERALD A. KUMMER AND KUNIE M. KUMMER REVOCABLE LIVING TRUST DATED 9 MARCH, 2004,
Defendants/Appellants/Cross-Appellees.

No. 2 CA-CV 2013-0100
Filed May 6, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Cochise County
No. CV201100213
The Honorable Charles A. Irwin, Judge

VACATED IN PART; AFFIRMED IN PART; REMANDED TO CONFORM JUDGMENT

COUNSEL

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Chief Judge Howard and Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Defendants Gerald A. Kummer and Kunie M. Kummer, as co-trustees of the Gerald A. Kummer and Kunie M. Kummer Revocable Living Trust Dated March 9, 2004 (collectively Kummers) appeal the trial court's judgment entered after a bench trial that plaintiffs Potters Clay Realty, L.L.C. and Eldercare for Life Inc. (collectively Potters Clay) had an easement for ingress, egress, and utilities over a twelve-foot-wide portion of the Kummers' property. Potters Clay cross-appeals the court's denial of their request for attorney's fees. For the following reasons, we vacate the judgment in part and remand for the court to conform the judgment granting an easement by prescription only, consistent with this decision.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's ruling. *IB Property Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228 Ariz. 61, ¶ 2, 263 P.3d 69, 71 (App. 2011). Those facts, however, defy brief summary because there were multiple transfers of affected and contiguous properties among many parties, as well as various straw-man transactions. In

its broadest context, this easement dispute originated with an undivided forty-acre square parcel with a ranch house near the center. *See* Appx. 1 (Undated Cochise County Assessor's Map). In 1985, the owners sold the northern portion by a recorded conveyance that included a twenty-four foot "non-exclusive easement for ingress, egress and utilities" located near the division of the northern and southern portions of the property, described exclusively by metes and bounds (1985 Easement). A driveway was marked by fences to the north and south by 1988, but it appears the twenty-four foot easement as described did not precisely match the location of the driveway and fences. *See* Appx. 2 (2011 As-Built Survey). Both fences were too far north by nine feet, and about half of the width of the roadway ran north of the metes and bounds description. The northern and southern portions of the original property were subsequently divided into various parcels. The 1985 Easement is not in dispute, nor are several other conveyances of contiguous properties contested. The dispute is over the land where the fences and road were actually built (Disputed Easement).[1] We turn to those conveyances that were the subject of the one-day bench trial.

¶3 In late 1993, the Kummers[2] purchased two adjacent lots on the northern portion of the original property, known together as Parcel 6Y. The Kummers purchased the properties from Anna Zitzelsberger, who had received them from Friedrich and Ursula Schiller in June 1993.[3] In the Schiller-Zitzelsberger deed, the

[1] Although the dispute over whether there was an express easement covers an area described in deeds as twelve feet wide, approximately three feet are already included in the 1985 Easement, so the true dispute is the additional nine feet.

[2] The Kummers initially purchased the property as individuals, but transferred the properties to their trust in March 2004.

[3] The parties do not dispute that Zitzelsberger, Schiller's aunt, acted as a straw person so that the Schillers could subdivide their property into smaller parcels.

Schillers transferred two lots "[r]eserving unto the Grantors, their heirs, successors and/or assigns, an easement for ingress, egress and utilities over the South 12.00 feet herein" (1993 Reservation). This reservation nearly aligned with the location of the northern half of the Disputed Easement, including the 1988 fence and the roadway, which were still in place when the Kummers obtained possession.

¶4 In 1994, the Schillers recorded a stand-alone easement (1994 Easement), granting several nearby property owners the benefit of the 1993 Reservation included in the Schiller-Zitzelsberger deed. One set of property owners, John and Yolanda Fritz, had purchased the old ranch house west of the Kummers' property in 1988 (Parcel 6F). From the time they purchased the parcel, the Fritzes, and later their tenants, used the driveway and maintained the Disputed Easement, clearing weeds and trimming trees "[f]rom fence-to-fence." When Cochise County requested a name for the driveway that had turned into a road, the Fritzes called it Labrador Lane.

¶5 In January 2005, the Fritzes sold their property to Nathan S. Yarbrough and Monica R. Vandivort, who leased it to named plaintiff ElderCare for Life. Yarbrough and Vandivort conveyed the property to their limited liability company, Potters Clay Realty, just before trial. Yarbrough, Vandivort, and Potters Clay Realty continued to use Labrador Lane, maintained the Disputed Easement by mowing and laying out gravel fence to fence, and buried a water line parallel to the road when the well on their property ran dry.

¶6 In 2010, the Kummers removed the 1988 fence north of Labrador Lane and erected another fence approximately nine feet south, near the location of the original 1985 Easement, reducing the width of the road and blocking access to Potters Clay's water line. Potters Clay sought to quiet title to the easement, on the theories of express, implied, and prescriptive easements. The trial court found that Potters Clay had an express easement; alternatively, it found an implied or prescriptive easement over the south twelve feet of the Kummers' property.

Express and Implied Easement Theories

¶7 Although we ultimately uphold the judgment on the prescriptive easement theory only, we briefly address the other theories and our decision to remand for a new judgment. First, at oral argument, counsel for the Kummers conceded that the express easement theory ultimately failed because there was not sufficient evidence to show an ownership interest by the Schillers in Parcel 6F or the intent for an easement to benefit other property owners. We agree. As to the implied easement theory, both parties conceded at oral argument that, aside from the deed conveying the 1985 Easement, there was no evidence in the record regarding the use of the easement or the Potters Clay property prior to the Fritzes' purchase of it in 1988. On this record we cannot discern, among other things, whether the road and fence were built to match the metes and bounds description of the 1985 Easement, or vice versa; therefore, we cannot infer whether at the time Parcel 6F was severed from the rest of the northern potion the parties intended an easement over the Disputed Easement, or intended to rely on the metes and bounds description of the 1985 Easement in the chain of title. *See, e.g.*, *Koestel v. Buena Vista Pub. Svc. Corp.*, 138 Ariz. 578, 580, 676 P.2d 6, 8 (App. 1984) (implied easements attempt "to ascribe an intention to parties who had not thought of or had not bothered to put the intention into words"); *see also* Restatement (Third) of Property: Servitudes, § 2.12 (2000) (no implied intent where implied or express intent to contrary). We therefore vacate the judgment as to the express and implied easement theories.

Prescriptive Easement

¶8 Finding no express or implied easement, we address the Kummers' argument that the trial court erred in finding a prescriptive easement. The Kummers contend the use of the Disputed Easement was permissive rather than hostile; alternatively, even if there is a prescriptive easement, they argue the court erred in concluding it included all twelve feet of the south end of the Kummers' property.

¶9 "[A] party may obtain an easement by prescription if it can establish that 'the land in question has actually and visibly been

used for ten years, . . . the use began and continued under a claim of right, and the use was hostile to the title of the true owner.'" *Tumacacori Mission Land Dev., Ltd. v. Union Pac. R.*, 228 Ariz. 100, ¶ 5, 263 P.3d 649, 651 (App. 2011), *quoting Spaulding*, 218 Ariz. 196, ¶ 14, 181 P.3d at 248; *see also* A.R.S. § 12-526 (ten-year limitation period for adverse possession). When a claimant shows open, visible, and continuous use of the property of another for the period of time required, the use is presumed to be hostile. *Spaulding*, 218 Ariz. 196, ¶ 14, 181 P.3d at 248. "There need be no ill will or intent." *Rorebeck v. Criste*, 1 Ariz. App. 1, 4, 398 P.2d 678, 681 (1965).

¶10 The Kummers contend Potters Clay's use of their property was permissive because the property was rural, raising the presumption that "the use of roads or paths is . . . in the nature of permissive neighborly acquiescence." The Kummers also contend they and their predecessors did not have notice of the use of the easement.

¶11 The Kummers primarily rely on *England v. Ally Ong Hing*, 105 Ariz. 65, 72, 459 P.2d 498, 505 (1969), for the proposition that use of rural property is presumptively permissive. In *England*, the defendant owned an eighty-acre parcel of land on which the plaintiff drove cattle to water them at a spring and then graze them in another area. *Id.* at 67-68, 72, 459 P.2d at 500-01, 505. Our supreme court held that the plaintiffs had an easement by prescription for driving the cattle to the water because a predecessor to the defendant had attended a hearing in which plaintiffs were granted water rights, and therefore had notice that the plaintiffs would have to cross the land. *Id.* at 72, 459 P.2d at 505. The court also found that there was no prescriptive easement for grazing because there was no proof of notice to defendant or predecessor. *Id.* The court reasoned that where large bodies of privately owned land are unenclosed, owners do not object to people passing over them, therefore the use was permissive. *Id.*

¶12 Here, the Kummers are correct that the area was mostly vacant until the early 1990s. But the time to acquire a prescriptive easement is ten years; that would require visible use of the easement date back to only 2000, ten years before the Kummers moved their fence. Additionally, the Kummers' and Potters Clay's properties

were much smaller than the eighty acres in *England*, and the easement was fenced in and maintained.

¶13 Regarding notice, Gerald Kummer testified that the northern fence was already in place when the Kummers built their house in 1993, that they built a house with a back porch near Labrador Lane, and that they replaced the fence themselves in 1994. Further, the 1993 Reservation was apparent in the Kummers' chain of title, and Gerald Kummer testified that he was aware of it when he purchased the home in 1993. Even if the Kummers thought the 1993 Reservation was invalid, it provided notice of the location, dimensions, and uses of the easement. The trial court did not err in finding the use was not permissive.

¶14 The Kummers next argue that—assuming a prescriptive easement existed—the scope of the easement did not extend across the entire south twelve feet of his property because Potters Clay and its predecessors did not use the entire width. The trial court found that Potters Clay had established prescriptive rights to the entirety of the 1993 Reservation and 1994 Easement, which allowed for ingress, egress, and utilities along the south twelve feet of the Kummers' property. The trial court's findings of fact will stand unless clearly erroneous. *Spaulding*, 218 Ariz. at 199, 181 P.3d at 246.

¶15 The Kummers rely on a survey of the land to show that Labrador Lane did not cover the entire twelve feet, but do not dispute the testimony that the entire easement had been maintained. Fritz stated that he trimmed trees and cleared the easement from fence to fence beginning in 1988, and Yarbrough testified that he laid gravel from fence to fence as well. The trial court did not err in determining Potters Clay held a prescriptive easement spanning the south twelve feet of the Kummers' property.

Attorney's Fees

¶16 On cross appeal, Potters Clay claims the trial court erred in denying its request for attorney's fees because it was entitled to fees pursuant to A.R.S. § 12-1103(B). Because the trial court's decision relies on a matter of statutory interpretation, we

review this issue de novo. *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, ¶ 6, 202 P.3d 536, 539 (App. 2009).

¶17 To determine a statute's meaning, we look primarily to the statutory language and construe the terms according to their commonly accepted meanings. *Metzler v. BCI Coca-Cola Bottling Co. of Los Angeles*, 233 Ariz. 133, ¶ 8, 310 P.3d 9, 12 (App. 2013). "If a statute's language is clear, it is 'the best indicator of the authors' intent and as a matter of judicial restraint we must apply it without resorting to other methods of statutory interpretation, unless application of the plain meaning would lead to impossible or absurd results.'" *Id.*, *quoting Winterbottom v. Ronan*, 227 Ariz. 364, ¶ 5, 258 P.3d 182, 183 (App. 2011). Section 12-1103(B), A.R.S. states:

> If a party, twenty days prior to bringing the action to quiet title to real property, requests the person . . . holding an apparent adverse interest or right therein to execute a quit claim deed thereto, and also tenders to him five dollars for execution and delivery of the deed, and if such person refuses or neglects to comply, the filing of a disclaimer of interest or right shall not avoid the costs and the court may allow plaintiff, in addition to the ordinary costs, an attorney's fee to be fixed by the court.

The plain language of A.R.S. § 12-1103(B) clearly requires that the quit claim deed be requested prior to instituting a quiet title action.

¶18 Here, Potters Clay originally filed a complaint for declaratory judgment and to quiet title, alleging the theory of an express easement. During discovery, Potters Clay sent the Kummers a quit claim deed, five dollars, and a demand letter requesting the Kummers execute the deed. Potters Clay then amended its complaint to include theories of implied and prescriptive easement.

¶19 Potters Clay contends that because the implied and prescriptive easement claims were based on a new set of facts, the

new theories in the amended complaint constituted a new "action" under the statute. But it had already filed an "action to quiet title" pursuant to A.R.S. § 12-1101(A) before it presented the quit claim deed. Further, each new theory of an easement is not a new claim, because there is only one claim of relief—an order to quiet title. *See Robinson*, 225 Ariz. 191, ¶ 6, 236 P.3d at 420.

¶20 Potters Clay also argues that the statute's purpose of avoiding litigation supports the award of attorney's fees, because tendering the quit claim deed "in exchange for not amending the complaint . . . complied with the spirit and purpose of A.R.S. § 12-1103(B)." It admits, however, that by the time it submitted a quit claim deed, it had filed a complaint, the Kummers had answered, and discovery had begun. Litigation could not be avoided. By instituting a quiet title action before sending the quit claim deed, Potters Clay failed to comply with the plain language of A.R.S. § 12-1103(B).

¶21 Potters Clay contends the trial court's interpretation is in conflict with statutes and rules governing attorney conduct and ethical obligations because it denies it the chance to mitigate the expense of litigation when new theories are found in discovery, essentially forcing it to allege all theories in the first complaint, even if unsupported. Potters Clay did not raise this issue before the trial court, and therefore it has waived the argument on appeal.[4] *See Airfreight Exp. Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238 (App. 2007).

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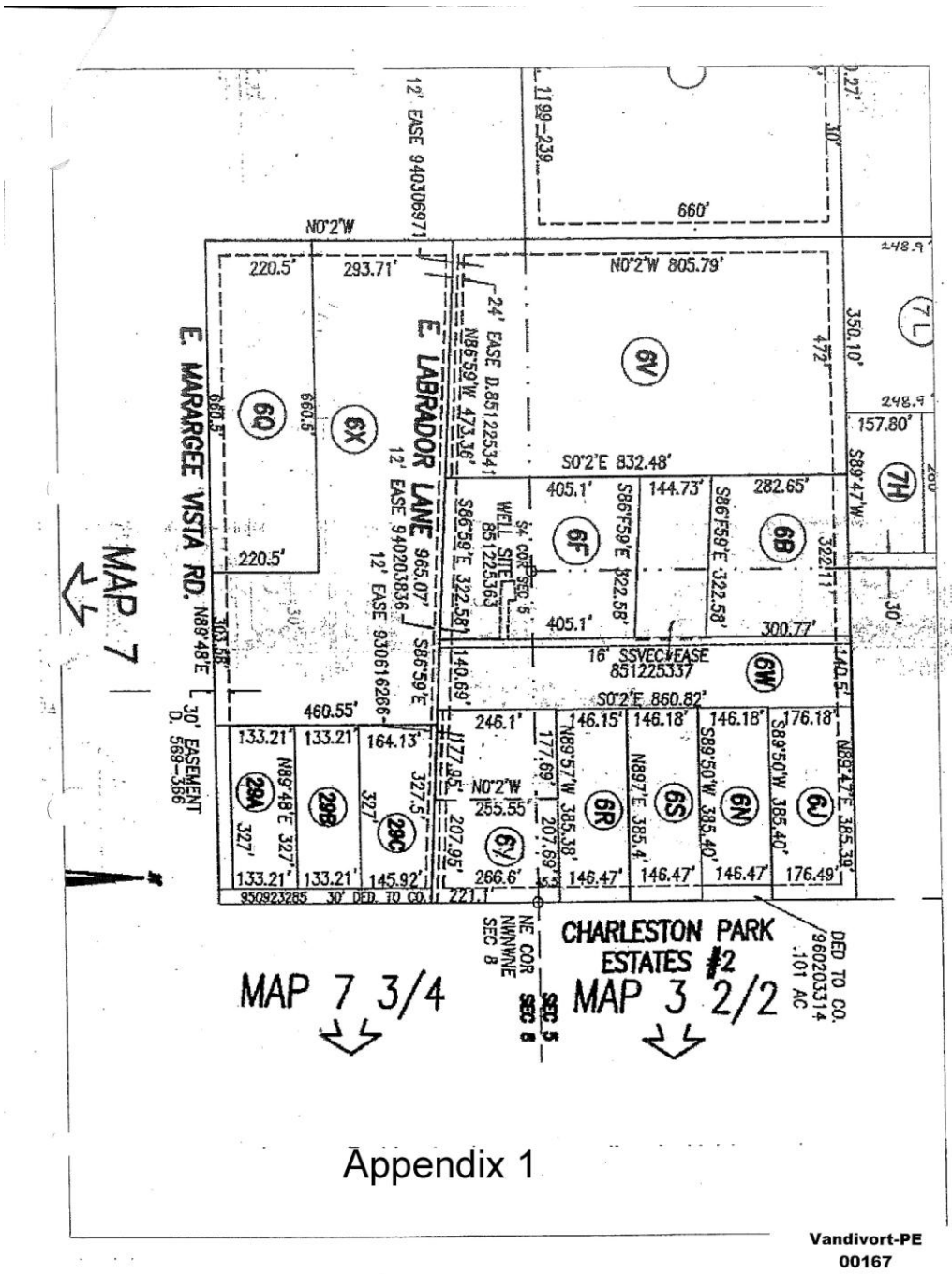
[4]Potters Clay contends it raised this issue before the trial court, but its brief in response to the Kummers' objection to the form of judgment only recited facts about when and why it decided to amend the complaint, without any reference to sanctions or ethical obligations, or citation to legal authority supporting an argument. Potters Clay failed to offer the trial court an opportunity to address the issue on its merits, therefore it is waived. *See Airfreight Exp. Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238 (App. 2007).

Disposition

¶22 For the reasons stated above, we vacate the judgment as it pertains to express and implied easements, affirm the judgment regarding prescriptive easement, remand for the trial court to conform the judgment consistent with this decision, granting an easement by prescription and ordering declaratory relief. In addition, in our discretion, we grant Potters Clay its requested costs on appeal pursuant to A.R.S. § 12-341, subject to compliance with Rule 21(c), Ariz. R. Civ. App. P. *See Chaurasia v. General Motors Corp.*, 212 Ariz. 18, ¶ 49, 126 P.3d 165, 177 (App. 2006).



Appendix 1

Vandivort-PE
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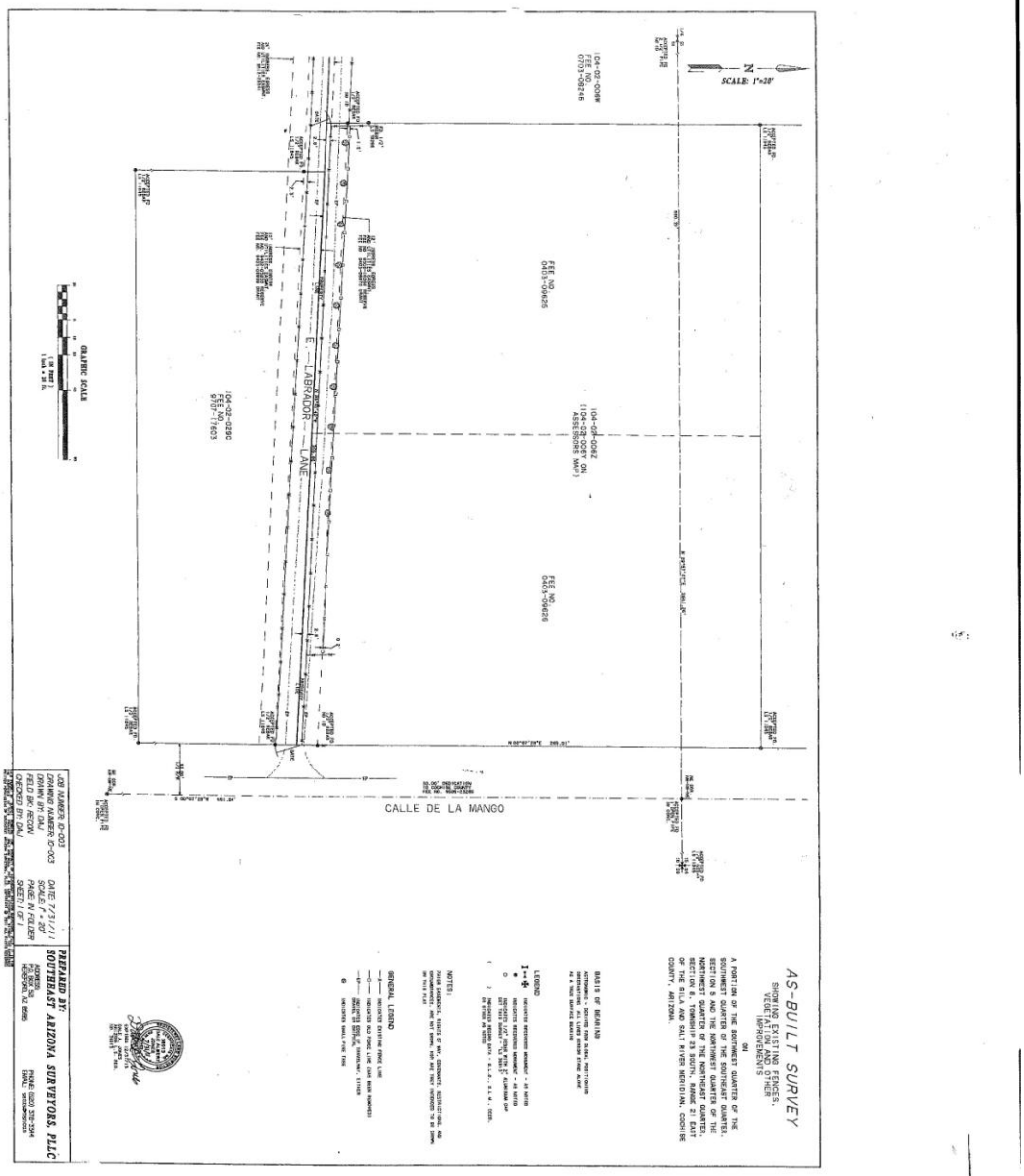

Vandivort-PE
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Appendix 2

/t-PE
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